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Courts and Objectors Explore Probation

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In the recent cases of *United States* v. *James Lovett*, District Court for the Eastern District of Pennsylvania, and the *United States* v. *Claire Street*, District Court for the Northern District of Illinois, two CO's were sentenced for refusing to register and then put on probation instead of being sent to prison. Some courts have refused to give probation to non-registrants and some CO's have declined to accept it. What lies behind the refusal of courts to give non-registrants probation and how can this be overcome? Does probation fit in with the principles of non-registrants?

Many violators of the 1948 Draft Act, especially the non-registrants, have had scruples about accepting probation because they detected something less uniform in the nature of the proceeding than in an ordinary criminal trial. The institution of probation was created by the March 4, 1925 Probation Act which reads as follows:

> "That the courts of the United States having jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best. . . . The court may revoke or modify any condition of probation, or may change the period of probation: Provided, That the period of probation, together with any extension thereof, shall not exceed five years."

Conscience of English Courts Moves U. S. Judges

In order to understand the attitude which English-speaking courts would be apt to take towards such an Act as this it is very helpful to go back to the 17th century History of English courts. In the 17th century when a man wanted to sue it was necessary for him to go to the King's Chancellor and obtain a writ, which operated, I suppose, as a sort of license to permit him to sue. There were different kinds of writs for different kinds of suits and if a man wanted to bring a suit for which there was no writ he was out of luck. Moreover, the law at this time was very rigid. For instance, if a man were on his way to pay off a loan on his home and if he were robbed while on the way two hours before the deadline, in a law court he would have lost his home for not paying the debt on time.

The practice arose of going to the King's Chancellor since he held the key of entry into the courts, and asking him to create a new writ when the injured party wanted to sue at law, and when that failed—as it would in the case I have given because the injured party would be only a defendant—the practice was to ask the Chancellor to interfere in the legal proceedings. After the Chancellor had commanded the plaintiff to stop his suit, he would hear the whole story himself, and thus he conducted his own court.

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Nearly Five Thousand COs Classified IV-E

A total of 4,903 registrants in the United States and Territories were classified IV-E (deferred CO) as of January 31, 1949, according to National Headquarters of Selective Service.

By states, Kansas had 797 IV-E classifications, Ohio 734, Indiana 592, Pennsylvania 585, California 296, Virginia 177.

In some states, re-classification to V-A (overage) and other classifications lowered the number of IV-E's from the previous month's total.

These figures show only the net increase or decrease of IV-E's. They do not reflect the total changes occurring from both new IV-E classifications and re-classifications from IV-E. The total number of IV-E classifications made under this draft is therefore higher than the current figures indicate.

(Selective Service estimates that under the 1940 draft, 52,000 persons were at one time or another classified IV-E, but as a result of re-classifications to II-C (farmer), I-A-O, I-A, IV-F, etc., only about 12,000 IV-E's were assigned to Civilian Public Service. From a *Program for National Security*, report of the President's Advisory Commission on Universal Training, May 29, 1947. p. 256).

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Greek Objector Executed

John Tsoukaris, a conscientious objector, was executed on February 11 by the Greek government because he refused to take military service. A military tribunal ordered him shot. He was a member of the Martyrs of Jehovah who in the U. S. are known as Jehovah's Witnesses.

Conscientious Objector Wins Citizenship

Jacob A. Wiebe, 31, Mennonite and conscientious objector of Beatrice was Thursday granted citizenship by Federal Judge John W. Delehant. The citizenship was denied him nearly seven years ago.

According to F. W. Carsten, Beatrice attorney representing the applicant, this was the first admission in Nebraska of a conscientious objector where the government had resisted.

"I am very happy to finally make the grade," said Wiebe. "I have been willing always to serve my country in civilian capacity."

Charles A. Rain, Omaha, naturalization examiner, who, in May, 1942, recommended that citizenship be denied Wiebe, was again present Thursday.

As to certain court decisions cited by counsel for applicants, Rain said that, generally speaking, they did not go so far as to include refusal to wear the uniform along with refusal to bear arms.

Although the law remains the same, Judge Delehant said the Supreme Court had modified its construction.

Court Reverses Earlier Decisions Barring CO's

"I denied this application in 1942, on motion of the naturalization examiner," he said, "because of majority court decisions holding that unwillingness to bear arms was adequate to bar citizenship. Later decisions have departed from early thinking with many of the earlier decisions repudiated. Motion for denial of citizenship will be overruled and petition granted."

Wiebe was born in Lysanderhoh, Russia. His parents were refugees at the time of the revolution in Russia and escaped in 1923. Examiner Rain did not press the original recommendation for denial of citizenship.—*The Lincoln* (*Nebraska*) *Evening Journal.*

What Would You Do?

A registrant returns his Classification Questionnaire (S.S.S. Form 100) wth Series XIV filled out to show that he is a CO. Before he receives the Special Form for COs (S.S.S. Form 150), his local board sends him a Notice of Classification in I-A. Later he received Form 150 and returns it completely filled out. The local board replies with a letter stating that the members do not think the informaton sufficient to justfy *reopening* the classification. What should he do?

(Answer on page 4)

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COURTS (continued on page 1)

The Chancellor's court was not, strictly speaking, bound by law. It was created to overcome the primitive justice of law, and the Chancellors in the beginning decided all cases according to conscience. It was a court of equity, and the saying was that equity is a court of conscience. To a lawyer "equity" means something contrary to law. Law is somewhat a rigid application of precedents to solve the problem presented in any case. Equity in the beginning was a discretionary hearing, in which there were no precedents, which was designed to solve the problem according to the conscience of the Chancellor.

Courts of Equity Stress Personality Above Law

Equity had another peculiar character. It dealt in terms of personalities more than the law courts did. In a law court the judgment was almost always for money damages and if they were not paid, then the sheriff seized the property and made the payment out of the proceeds of the sale. In a court of equity the judge always decreed that the losing party should do something or not do something—that he should tear down a building or else refrain from building one. If a man refused to do the ordered act, he could always be sent to prison for disobedience of the court; but the court would never bother to do the act for him, as the sheriff would at law. In other words, in equity one always had the choice of submitting to the decree or going to jail, where he would stay indefinitely until he changed his mind. The usual way of stating this is that equity acts *in personem*, or only on the personality, while law acts *in rem*, or on the property itself.

The reason for this difference is that when the Chancellor first acted he was interfering with a legal proceeding, and out of respect for the judge he would order the *plaintiff* not to sue but he would never give an order to the judge; and if the plaintiff did go ahead and sue, again out of respect for the judge the judgment would be regarded as legally binding; and so I imagine that the plaintiff would then be put in prison for disobeying the Chancellor until he agreed not to enforce the judgment. The person of the plaintiff was bound by the equity decree; but his property, the legal judgment, was not affected by the decree, out of respect for the judge and the dignity of the law.

Religious Non-Conformists Prefer Law-Bound Courts

As you can see the Chancellor had very great power. When he imprisoned a man for disobeying his decrees it was without a jury trial, as it still is, since this imprisonment was not regarded as being strictly criminal. You can usually tell a Chancellor by looking at his picture. A judge wears a plain robe and a plain wig, but a Chancellor wears crimson and ermine, and a great deal of scrambled eggs and a wig several times the size of a lion's mane.

"Pennsylvania Wonders Me"

While courts of equity accomplished a great deal of good, they were not popular in Philadelphia. Some of the colonists felt that it was unequalitarian to allow one man so much power. That was true in many colonies; but in Pennsylvania they have never allowed the courts of equity. Most of the other colonies did permit them, and today—except in Delaware and a few other places—the same judge administers both equity and law. This is the present situation in Federal Courts.

This historical background is going to influence the courts a great deal in their interpretation of probation. The Probation Act was passed because many judges felt that the law required them to imprison when they knew in their hearts that they were doing more harm than good. The Act was especially passed to prevent a judge from ever having to feel that the law required him to imprison a man when he knew that the best interest of society would not be solved by imprisonment. The Act, therefore, instructs the judge to think more in terms of *personality* and less in terms of *law* at a probation hearing. Probation has many resemblances to equity.

Courts' Understanding Displaces Constitutional Safeguards

The probation hearing usually occurs in a criminal trial at about the time the sentence is being passed and is called "Proceeding at the time of Sentence." It is not part of the criminal trial. As the law now stands if a judge wants to call in a probationer after six months on probation to revoke probation for a misconduct, they could bring the probationer in, in a patrol wagon without previous warning. There is no requirement of due process in the way a probationer is summoned nor requirement that he be given notice of the proceeding. I don't think it is essential that he be allowed to see the probation officer's confidential report, although in a criminal proceeding he would be entitled to see all of the evidence against him. He is entitled to no trial by jury and therefore all of the constitutional guarantees which apply in criminal cases do not apply to probation. No court has ever decided these things and someone will someday challenge the constitutionality of these practices; but, at any rate, that is the way the Probation Act is applied today.

The criminal trial is called *United States* v. *Thoreau* because in it the United States is contending against the defendant. While the probation proceeding goes under the same name, one could only justify the discretionary treatment of probation by calling it *In Re Thoreau*, indicating that now no one is contending against the defendant, and his interest is being considered in and by itself. The proceeding now is no longer to determine his guilt as would be true in a criminal trial, but to benefit him. Probation is not an adversary proceeding. If it were, it would be a continuation of the trial, and all of the constitutional guarantees would apply. While this is the only theory on which to justify present practices, I am not entirely convinced that it is true. The Probation Act instructs the court to consider the public interest; and the public is, after all, the adversary in the criminal trial. So, it seems doubtful that probation is any less of an adversary proceeding than the actual trial itself.

Courts Narrow Purpose of Probation to Reform

The modern justification of these powers in a judge would be that the defendant is entitled to no more than his sentence. Anything else he gets at probation is a gift; therefore it was constitutional to make it discretionary on the basis of personality. The legal justification would be that constitutional guarantees in criminal proceedings apply only to those proceedings that existed when the Constitution was written. This article must be too brief to present the answers to those; and in the following discussion we will accept the present practices.

In applying probation to draft cases, considerable light is thrown on the nature of the institution. Some criminologists have supposed that it was meant to *reform* the convict. They have read this interpretation into the Act and United States attorneys have added that where the probationer is guilty of a second felony during probation it must be revoked. A number of courts have gone on this theory in draft cases without analyzing the question involved. They refuse to give probation where every day the nonregistrant would be guilty of a new refusal and a new breach and where he plainly announced his intention of not reforming. This interpretation of the Act is far narrower than the actual wording and purpose which is quoted above.

It results from having too many social workers in probation work. The actual wording is broad enough to embrace recognition of conscience and whenever a court brings up the point of the continuing violation of a man who is placed on probation, the defendant should squarely put this problem of interpretating the Act, *reform* v. *recognition of conscience*, and point out that the court does not have to follow a social worker's interpretation. The plain wording of the Act plus its purpose of freeing the conscience of the judge are all in favor of the draft violator.

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Probation Act Covers Recognition of Conscience

One argument for construing the Probation Act to include recognition of conscience is the fact that Selective Service Act recognizes conscience in Section 6 (j). It is quite reasonable to read two Acts of Congress together, on the theory that the correct interpretation of each is the interpretation most consistent with other Acts, even of other Congresses. The Selective Service recognition of conscience was mentioned in the probational proceedings of United States v. Lovett. The argument may have had some weight if the court privately followed a line of reasoning like this. If Congress would grant exemption from service on the grounds of conscience it would certainly grant probation from confinement on the same ground, and reading the Selective Service Act along with the Probation Act helps us to interpret the latter. The same case also mentioned the Nuernburg statement that the individual is responsible for defying immoral commands of the state, and this may have helped the Lovett court in construing the Probation Act favorably, which I think it seems to have done between the lines.

When the United States attorney takes up the argument that probation cannot be given where the defendant would continue to break the law every day, he is merely expressing the argument in legal terms; and if the judge decides against restricting probation to reform, the continuing violation is no obstacle. When a United States attorney takes this tack the defendant should point out two things—firmly but without antagonizing the court: First of all probation is not a *legal* proceeding. It is a mere discretionary hearing in the nature of equity. Any attempt to bring in principles of law to create hard and fast rules outside of what the Act provides, any attempt to take conditions placed by the judge in reform cases, and make them precedents in recognition-of-conscience cases is an attempt to bring the law into equity and is decidedly improper. There are no precedents in pure equity or probation. It violates the very purpose of the Act to introduce precedents and to start building up crystallized rules which prevent the judge from serving the ends of justice and the best interests of the public and the defendant.

Use of Precedents Restricted In Probation Hearing

The only law pertinent to a probation proceeding is the Probation Act itself which sets up the institution. Legal decisions interpreting what the Probation Act means might be cited as precedents in construing the Act. We know of none squarely construing this issue of *reform* v. *recognition of conscience;* but every time a court gives probation, while this is not a legal decision squarely on the point of construing the Act because it was not an adversary proceeding and both sides were never fully argued, still the court will show what its interpretation was between the lines; and it is appropriate to show in court the record of what another court is doing with regard to probation in order to show how other courts will probably construe the Act if the point ever comes up for a legal decision. In other words, probation proceedings can be used as precedents, or as having something of the color of precedents, on the one point of interpreting the meaning of the Probation Act—because the Act is all the law there is in a probation hearing. Therefore, after the Act is interpreted and the question arises as to whether this man will be given probation the decision must be on the basis of personality, and to quote precedents would be decidedly out of line with the nature of the proceeding, which is equitable in the extreme sense of the word and not legal. In other words, if a judge grants probation to a car thief for the purpose of reforming him, and later states that it was on condition that the man steal no more cars, it would be a violation of the nature of the hearing to make this a crystallized precedent in the case of a draft violator placed on probation in recognition of conscience, and to say that the draft violator therefore cannot be given probation where he would every day continue to violate the draft. The reader must draw a very careful line for himself to fix in his mind the occasions when it would be proper to use a probation record after the fashion of a precedent and when it would not be.

Judges Bewildered Without Law and Precedent

If the judge fails to give probation with words plainly showing he accepted the United States attorney's argument, it might be worthwhile to appeal the case on the grounds that the judge refused to accept certain mitigating facts, due to a mistake of law on his part. For instance the judge might say, "I see no benefit to the public or to this man from imprisonment, but I have no other choice." While it would be hard to argue that anyone has a right to probation it might be argued that every one has a right to present a request for probation to a judge who understands the law on the subject. A denial of probation on the grounds of personality may not be appealed; but a denial of probation on the grounds that the judge erroneously thinks he can't give it in this case is a denial of due process and possibly is grounds for reversal or at least a new probation hearing.

If the United States attorney is persistent in his arguments against the defendant the defendant should suggest to the court, firmly but in a conciliatory fashion, that probation is not an adversary proceeding but that the only thing to be considered is the welfare of the public and the defendant; and that if it were otherwise the defendant would be entitled to a trial by jury and the right to see and answer the probation officer's report: Pennsylvania vs. Fisher, 213 Pennsylvania 48 (1905); "*A Juvenile Court is a Court of Equity,*" Judge Gustav L. Schramm, Juvenile Court of Allegheny County, Pittsburgh, Pennsylvania, "Federal Probation," January-March, 1947.

It should be mentioned in this connection also that if one draft violator takes probation on condition of overseas service he need not feel that the condition will be a precedent in the case of other draft violators if the subsequent cases are expertly presented. Eventually, if a Federal Judge grants probation without any conditions to a draft violator, he will never permit anyone to tell him that he must use that as a precedent in all future cases, and he will clearly see then how erroneous it is to use precedents in a pure equity proceeding.

Courts' Mistake Inflicts Modern Exile

Even if a court does restrict probation to reforming the prisoner, and therefore recognizes the technical limitation that the defendant cannot continue breaking the law and still have probation, there is an "out." While the Selective Service Act requires all American males in certain age groups to register, no registration boards have as yet been set up overseas; and Americans abroad do not have to report to the United States Consulate. Therefore if a non-registrant is put on probation with the condition that he do overseas relief, the continuing day to day breach will be no problem abroad, since there is no prosecution for refusal to register there. Even if boards are later set up, this may continue to be true in some parts of the Orient and even Europe; but I don't think the probation seeker should make this argument except as a last resort, but should first advance the thought that the wording of the Probation Act embraces more than reform and therefore no such condition is necessary.

Of course, if anyone ever succeeds in obtaining all of the constitutional guarantees for criminal trials in a probation hearing then the suggested equity nature of the hearing will be entirely changed. It will be a recognized legal proceeding and it will be more difficult (though not impossible) to keep precedents from creeping in. Whether the Probation Act would be held unconstitutional because it gives the decision to the "court" or whether "court" would be held to include jury so as to let the Act remain in force with a jury functioning under it is a subsidiary question here.

Probation Hearing Advances Human Cell Techniques

The old attitude which colonists took toward equity crops up again in the attitude of some CO's toward probation. They react against it as a strong concentration of power in the hands of a single individual and fail to consider that it was a great improvement over the situation that existed before probation was allowed. CO's should consider two things: First, in helping courts define the status they may be encouraging its freer use in ordinary criminal cases; secondly, many of these CO's advocate a human-cell approach to solving problems and dislike a centralized, governmental approach. In order to obtain a perfectly uniform disposition of all CO cases it would be necessary for

(*Continued on Page* 4)

Mounting Number of Non-Registrants Arrested

Total arrested to date (March 21) — 76

Disposition of cases:

Sent to prison	40
On probation to AFSC	2
Case dismissed by Commissioner	1
Registered after arrest	6
Cases disposed of	49
Cases pending	27
Total	76

General Status of Men Arrested:

Married (four with children)	14
Average age	23 years

Religious Affiliation:

Friends	35
Methodist	7
Unaffiliated	16
Unknown	13

One or two from each of the following: Brethren, Mennonite, Baptist, Presbyterian, Congregational, Episcopal.

Occupation:

Students	45

Others are teachers, farmers, ministers, actors, clerks, et al.—(From Central Committee for Conscientious Objectors.)

Draftees Granted Access To Files

When a CO has difficulty with his classification and writes to the National Service Board for advice it would be of great help in analyzing his problem if he would send a copy of all of the material in his Selective Service file. His file should include everything he has submitted to his local board and it will also include any evidence offered against him. The board must make a written summary of any information it considers which is not already in writing and put it in the registrant's file (S.S. Reg. 623.1). It must also receive any information pertinent to the registrant's classification submitted to it (Reg. 622.1 (c)) and this includes information against the registrant submitted by third parties. Putting these two regulations together it is apparent that the file should contain all of the material from outside sources which the board receives as well as written summaries of any material which the board considered that was not in writing.

The registrant may ask his board what it considered and then check with his file to make sure that all of the material is in it. He should further see if there is any unfavorable evidence and refute it if he can. Information in a registrant's file is available for inspection by the registrant or another person authorized by him (Reg. 606.32) and these regulations say that he may either inspect the file visually or else be furnished substantial or verbatim copies. He can do this when the file is with the local board or when it has gone on appeal.

A CO should also ask to know the evidence against him at his Department of Justice hearing.

The only formality required of the registrant to obtain these things is that he must properly identify himself.

Full Facts Needed to Answer CO's

After we have seen a copy of the material in his file we may be better able to tell the man why he is having trouble getting his classification. In reporting their problems to us COs frequently fail to mention things such as what steps they took, what the local board said, etc., which usually make a great difference in what should be done to correct or remedy the problem.

PROBATION (continued from page 3)

the government authorities or Congress to enact some uniform law. However, in probation the individual can deal with the judge on a face-to-face, human-cell basis. In other words standardized treatment necessarily involves some centralized approach; while the human-cell method must necessarily end in a lack of uniformity. It would seem that the probation proceeding lends itself best to the decentralized, human-cell philosophy, where personality and not law is the ultimate determinant.

IV-E's (continued from page 1)

The number of IV-E classifications for the three months for which reports have been made is:

November	3,629
December	4,502
January	4,903

The number of IV-E classifications by states and territories is as follows:

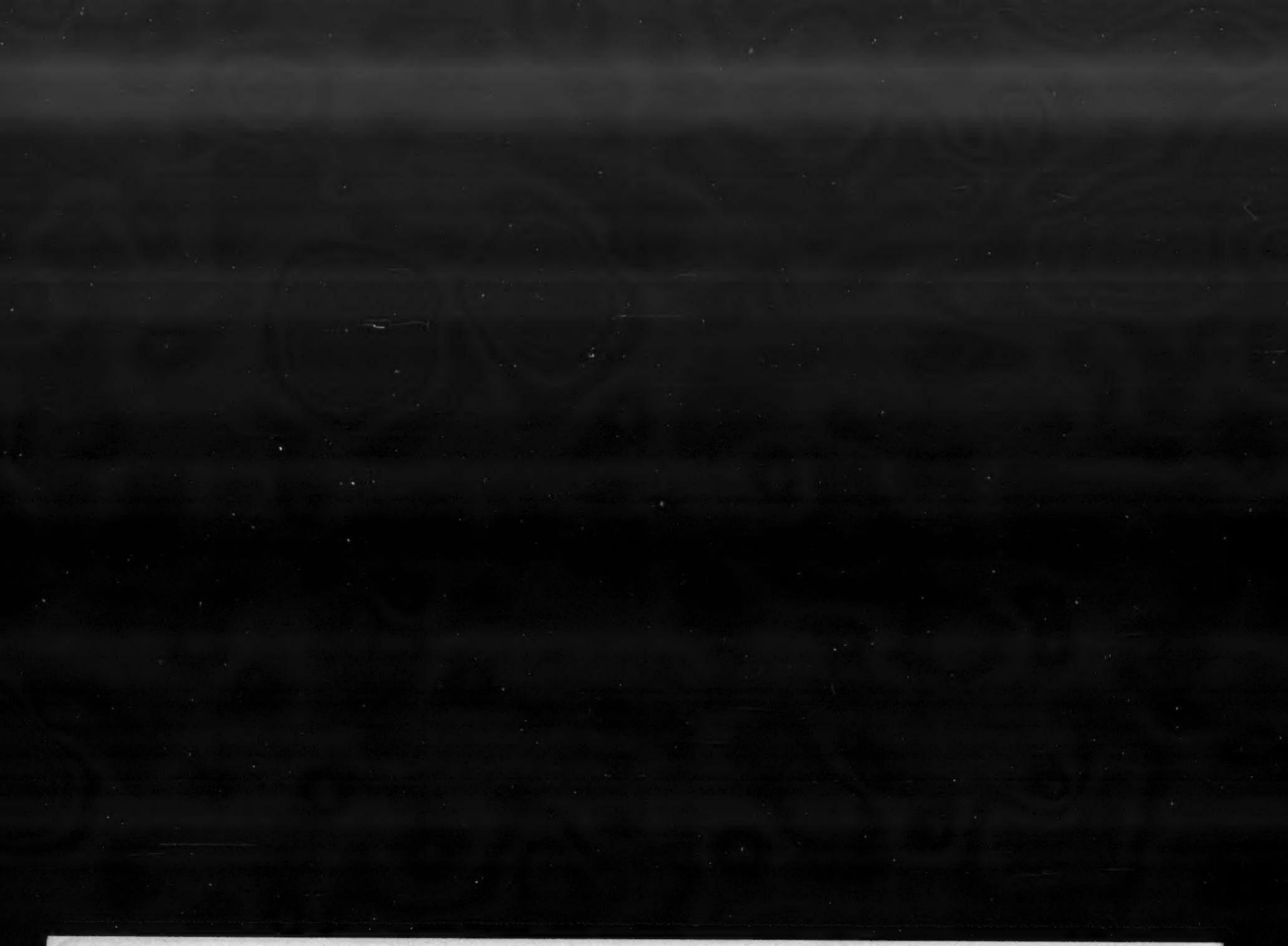
Alabama	13	New Hampshire	2
Arizona	16	New Jersey	21
Arkansas	13	New Mexico	17
California	296	New York City	6
Colorado	18	New York (ex. N.Y.C.)	51
Connecticut	7	No. Carolina	113
Delaware	11	No. Dakota	38
District of Columbia	4	Ohio	734
Florida	24	Oklahoma	58
Georgia	16	Oregon	97
Idaho	62	Pennsylvania	585
Illinois	132	Rhode Island	2
Indiana	592	So. Carolina	6
Iowa	88	So. Dakota	41
Kansas	797	Tennessee	69
Kentucky	6	Texas	94
Louisiana	12	Utah	—
Maine	3	Vermont	1
Maryland	72	Virginia	177
Massachusetts	8	Washington	33
Michigan	130	West Virginia	27
Minnesota	82	Wisconsin	40
Mississippi	10	Wyoming	2
Missouri	66	Alaska	2
Montana	74	Hawaii	3
Nebraska	122	Puerto Rico	8
Nevada	2	Virgin Islands	—

What Would You Do?

Answer to Problem on Page One

When a *reopening* is denied the registrant has no right to appeal as he has following classification. When a reopening is denied the registrants gets a letter to that effect; when the *reopening* is allowed and only the *classification* is denied the registrant gets a new Notice of Classification.

In this case the board is trying to deny the right of *appeal* by telling the registrant his classification will not be *reopened*. But a reopening is unnecessary. Registrants are not to be classified until the time allowed for the return of the Classification Questionnaire (Form 100) has expired (Reg. 623.1). The Special Form for COs (Form 150) becomes a part of the Classfication Questionnaire as soon as it is filed (Reg. 621.11). Putting these two regulations together local boards are not to classify registrants who indicate they are COs in Series XIV of the Classification Questionnaire until the Form 150 has been sent out and the time for its return expired. So the classfiication in this case is still *open* and no *reopening* is needed.

Section 10(b)(3) of the Selective Service Act only gives the local boards the power *"under rules and regulations* prestcribed by the President . . . to hear and determine . . . claims with respect to . . . training and service." When the board acts outside of the Regulations its decisions are void. Therefore the board must still classify the registrant and send him a new Notice of Classification giving him the right to appeal since the first classification was abortive and it erred in supposing that a reopening was needed by the CO.

If the board will not recognize this point the registrant should ask the State Director to instruct the board about it under Reg. 624.12 which makes him responsible for the functions of Selective Service in his state. It might also be advisable to cite to him the appeal Regulation 606.2 although supposedly it would do no good to cite them to the local board since it intended to deny appeal when it pretended that a reopening was the proper procedure.